

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT ALBERGO, et al.,

Plaintiffs,

vs.

IMMUNOSYN CORPORATION, et al.,

Defendants.

CASE NO. 09CV2653 DMS (AJB)

**ORDER GRANTING
DEFENDANTS' MOTION FOR
RECONSIDERATION**

Pending before the Court is Defendants James and Dona Miceli's motion for reconsideration of the Court's Order granting Plaintiffs' motion for a writ of attachment. For the following reasons, Defendants' motion is granted.

I.

BACKGROUND

Plaintiffs Robert Albergo and David Irwin allege that in early 2006, they were induced to invest a combined \$1,025,000 in unrestricted stock of a "start-up" company called Nurovysn Biotech Corporation (now Immunosyn) through Argyll Equities. (FAC ¶¶ 65-68, 72, 76.) Based upon representations made to them, Plaintiffs were induced to enter into what the parties have called the First Argyll Contracts. (*Id.* at ¶ 65.) Under these contracts, executed in March and April 2006, Plaintiff Albergo paid \$1,000,000 and Plaintiff Irwin paid \$25,000 in exchange for 100,000 and 2,500 free-trading shares of common stock in Immunosyn, respectively. (*Id.* at ¶¶ 65-68, 72, 76.) Neither

1 Plaintiff received the stock. (*Id.* at ¶ 128, 137.) Then, on May 7, 2007, Plaintiffs received a letter from
 2 Defendant James Miceli requiring them to sign new contracts, the so-called Second Argyll Contracts,
 3 in order to receive their original stock certificates. (*Id.* at ¶ 79.) The Second Argyll Contracts
 4 contained terms and conditions not present in the First Argyll Contracts. (*Id.* at ¶ 80.) However,
 5 because of the alleged false representations of Defendants, and given the requirement that Plaintiffs
 6 sign the Second Argyll Contracts in order to receive the original stock they purchased, both Plaintiffs
 7 signed the Second Argyll Contracts. (*Id.* at ¶ 81.) On November 24, 2009, Plaintiffs filed suit in this
 8 Court. (Doc. 1.) In their First Amended Complaint (“FAC”), Plaintiffs assert eight claims for relief:
 9 (1) breach of contract, (2) violation of the Securities Exchange Act, (3) fraud and fraud in the
 10 inducement, (4) violation of RICO, (5) conspiracy to violate RICO, (6) civil conspiracy, (7) unjust
 11 enrichment, and (8) fraudulent conveyance.

12 On April 18, 2010, Plaintiffs filed a motion for a writ of attachment against the real property
 13 of Defendants James and Dona Miceli based upon their claims for breach of contract and fraudulent
 14 inducement. (Doc. 17.) On June 15, 2010, Defendants filed a motion to dismiss Plaintiffs’ FAC.
 15 (Doc. 27.) The Court issued an Order on August 23, 2010, granting in part and denying in part
 16 Defendants’ motion to dismiss and granting Plaintiffs’ motion for a writ of attachment. (Doc. 33.)
 17 The Court subsequently amended its August 23 Order to reflect the accurate address of the property
 18 subject to the writ of attachment. (Doc. 46.) On October 22, 2010, after being granted an extension
 19 of time to do so, Defendants James and Dona Miceli (herein, “Defendants”) filed a motion for
 20 reconsideration of the Court’s August 23 Order granting Plaintiffs’ motion for a writ of attachment.
 21 (Doc. 61.)

22 II.

23 LEGAL STANDARD

24 The Federal Rules do not expressly authorize a motion for reconsideration. However, “as long
 25 as a district court has jurisdiction over the case, then it possesses the inherent procedural power to
 26 reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.” *Los*
 27 *Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 889 (9th Cir. 2001)(quotation
 28 omitted). Reconsideration will generally be appropriate “if the district court (1) is presented with

1 newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or
 2 (3) if there in an intervening change in controlling law.” *School Dist. No. 1J, Multnomah County, Or.*
 3 *v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

4 Under the Federal Rules of Civil Procedure, motions for writs of attachment are governed by
 5 the laws of the state where the district court is located. Fed. R. Civ. P. 64. Under California law, to
 6 secure a writ of attachment, the Plaintiffs have the burden of proving: (1) the claim is one on which
 7 an attachment may be issued; (2) the probable validity of such claim; (3) the attachment is not sought
 8 for any other purpose than to secure recovery on the claim; and (4) the amount to be secured by the
 9 attachment is greater than zero. Cal. Civ. Proc. Code § 484.090. Probable validity exists where it is
 10 “more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.”
 11 Cal. Civ. Proc. Code § 481.190. In other words, “the Court must consider the relative merits of the
 12 positions of the respective parties and make a determination of the probable outcome of the litigation.”
 13 *Loeb & Loeb v. Beverly Glen Music, Inc.*, 166 Cal. App. 3d 1110, 1120 (1985). Because the writ of
 14 attachment at issue here would cause Defendants to lose control of their property, the prerequisites for
 15 issuance of a writ of attachment are strictly construed against Plaintiffs. *Blastrac v. Concrete Solutions*
 16 *& Supply*, 678 F. Supp. 2d 1001, 1004 (C.D. Cal. 2010). Furthermore, an attachment may be issued
 17 only if the claim sued upon is (a) a claim for money based upon a contract, express or implied; (b) of
 18 a fixed or readily ascertainable amount not less than \$500 (by reference to the contract itself); (c) that
 19 is either unsecured or secured by personal property, not real property; and (d) is a commercial claim.
 20 Cal. Civ. Proc. Code § 483.010.

21 III.

22 DISCUSSION

23 Defendants move for reconsideration on the basis that newly discovered evidence indicates that
 24 Plaintiffs each signed rescission agreements rescinding the First Argyll Contracts and, accordingly,
 25 there is no longer probable validity that Plaintiffs will succeed on their breach of contract and
 26 fraudulent inducement claims and a writ of attachment may not be maintained. Plaintiffs argue the
 27 rescission agreements do not constitute newly discovered evidence and that, even if the Court grants
 28 Defendants’ motion for reconsideration, the rescission agreements do not change the outcome of

1 Plaintiffs' motion for a writ of attachment because Defendants themselves breached the rescission
2 agreements. Plaintiff Irwin further states he believes the signature on the rescission agreement
3 identified by Defendants to have been signed by him is a forgery. (Declaration of David Irwin at ¶ 6.)
4 Plaintiff Albergo admits to having signed a rescission agreement, but claims he only did so because
5 he was told it was necessary for him to receive his stocks under the First Argyll Contracts.
6 (Declaration of Robert Albergo at ¶¶ 8, 10.)

7 In light of the existence of the rescission agreements, and in order to prevent injustice, the
8 Court exercises its inherent authority to reconsider and modify its own orders and grants Defendants'
9 motion for reconsideration. The burden placed upon a party seeking a prejudgment writ of attachment
10 is a heavy one and the requirements for the issuance of a writ of attachment are to be strictly construed
11 against the applicant. *Blastrac*, 678 F. Supp. 2d at 1004. In considering the rescission agreements,
12 the Court finds Plaintiffs have failed to meet their burden of demonstrating probable validity as to their
13 breach of contract and fraudulent inducement claims. Accordingly, the Court's August 23, 2010
14 Order, as amended by the Court's September 30 Order, is vacated in so far as it granted Plaintiff's
15 motion for a writ of attachment. Should Plaintiffs seek to renew their motion for a writ of attachment,
16 the Court invites briefing on the probable validity of their breach of contract and fraudulent
17 inducement claims in light of the rescission agreements.

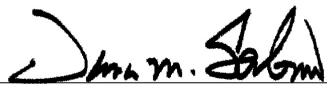
18 III.

19 CONCLUSION

20 For the foregoing reasons, Defendants' motion for reconsideration is granted. The Court's
21 August 23, 2010 Order, as amended by the Court's September 30 Order, is vacated in so far as it
22 granted Plaintiff's motion for a writ of attachment. The writ of attachment issued on October 14, 2010
23 is vacated.

24 **IT IS SO ORDERED.**

25 DATED: December 15, 2010

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28 HON. DANA M. SABRAW
United States District Judge